1055

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-1055

DON GLASSER,
Petitioner,

v.

WILLARD ALEXANDER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner, Don Glasser, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in this case November 1st, 1972.

Opinions Below

The Opinion of the Court of Appeals of the State of New York is reported in 31 NY 2d 270. A copy appears in the Appendix. The opinions (majority and dissenting) of the Appellate Division, First Department, of the Supreme Court of the State of New York are reported in 38 AD 2d 546. Special Term's decision and order also appear in the Appendix, since it is unreported.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered November 1st, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1257; because substantial federal questions were raised below by petitioner and decided by the State Court as to: (a) the meaning and application of Section 101 (a) (4) of the Labor-Management Reporting and Disclosure Act of 1959 (Title 29, Chap. 11, Section 411 (a) (4) U.S.C.), which is hereinafter referred to as "LMRDA"; (b) the exclusive jurisdiction of the United States District Court for the Southern District of New York; and (c) constitutional due process under the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

(1) Did the Court of Appeals of the State of New York misconstrue and misapply Section 101 (a) (4) LM RDA: (a) by deeming it irrelevant to the intra-Union proceedings misnamed "arbitration" in this case; (b) by holding that said section, because "merely designed to protect the right of a union member to proceed in court against the union or its officers", is inapplicable here; and (c) by ruling that "the compulsory arbitration rules here in question in no way limit that right"?

(2) Since the undisputed facts are that: (a) petitioner, Don Glasser, had on June 2nd, 1970, instituted an action (70 Civil 2347) in the United States District Court for the Southern District of New York to vacate under Section 101 (a) (5) LMRDA, the alleged "arbitration Award" in this case; (b) respondent, some five months after June 2nd, 1970, filed its motion herein in the State court to affirm and to enforce said "Award"; and (c) this sequence of events and the applicable case-rule of this Court were called to the attention of all State courts involved, including the Court of Appeals of the State of New York: did the last named State court disregard authoritative cases of this Court as to the exclusive jurisdiction of the federal district court?

(3) Whether the intra-union procedure, which was approved by the State courts in this case and which is nationally applied to the musical industry by the American Federation of Musicians of the United States and Canada and its 640 local unions, fulfills the requirements of due process under the Fourteenth Amendment, where that procedure, as described in the union bylaws and as applied in this case, did not allow full hearing and cross-examination of any witness before the alleged "arbitrators" (who are all members of the Union's International Executive Board)?

(4) Whether it was due process under the Fourteenth Amendment for the "arbitrators" and the State courts in this case to base their respective decisions upon hearsay affidavits supplied only by Respondent's attorney and not by the Respondent or any of its officers or agents having direct knowledge of the facts in this case?

The Statutory Provisions Involved

(4) PROTECTION OF THE RIGHT TO SUE.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a pro-

> ceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: PROVIDED, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: AND PROVIDED FURTHER, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

Article 9 of the AFM Bylaws, on which the rulings of the court below were based and which was part of the record on appeal below, is reproduced in the Appendix.

Statement of the Case

Don Glasser, the petitioner here, is a nationally known orchestra-leader-employer, who has before and since the alleged "arbitration" herein, repeatedly booked himself (as leader) and his orchestra into Roseland Dance City, at 52nd Street, between Broadway and Eighth Avenue, Manhattan, New York City. He is, and for years has been, a member of AFM, with which he has no labor contract.

On or before July 1st, 1968, Glasser personally negotiated and signed two engagement contracts with Roseland Amusement Co. Inc. (hereinafter "Roseland") of 237

West 52nd Street, New York, N. Y. (18-21; 47-49). On behalf of Roseland, these two contracts were signed by Abe Holtzman, a Roseland official, and long a friend and client of Glasser. The two contract forms (18-21) were typed in Holtzman's office and were personally brought by him to Glasser for signature. *Neither of the two engagement contracts was signed by Willard Alexander, Inc.,* which was not a party thereto. The only signatures on the two said contracts ("Form B"* contracts which are engagement contracts between the orchestra leader and the purchaser of music only) were those of Holtzman and of Glasser. The latter absent-mindedly and erroneously entered the name, "Willard Alexander, Inc." on the last line of the form (that Company had acted as his non-exclusive booking-agent in *other* matters). The last line of the form is for signature by the booking agent who is *not, however,* a party to the "Form B contract". Glasser did this unintentionally and without authorization from Willard.

After Glasser signed the two forms, he handed them over to Mr. Holtzman, who thereafter submitted them to Associated Musicians of Greater New York, Local 802, AFM (hereinafter "Local 802") for approval pursuant to the bylaws of that Local and of its International, AFM. On July 9th, 1968, Local 802, by its Secretary, Lou Critelli, stamped both engagement contracts (signed by Glasser and Holtzman) "Approved" (18-21).**

Willard Alexander Inc. (hereinafter "Willard"), had nothing whatever to do with the solicitation, acquisition, preparation or eventual execution of either of the two involved engagement contracts (18-21). These were negoti-

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* "Form B" contracts are formulated, prescribed, printed and distributed by AFM; but neither AFM nor any of its Locals is a signatory of the "Form B."

** Numbers in parentheses indicate pages in the Record on Appeal before the New York Court of Appeals.

ated and executed (as had been for years all of their predecessors) by Glasser and Holtzman, *acting entirely without help or intermediation of any agent.*

The two said engagement contracts ("Form B" contracts) were performed by Glasser and his orchestra according to their terms.

On June 18, 1969, WILLARD billed Glasser for services as booking agent (22), although before and after that date WILLARD had rendered absolutely no such services and gave no help whatever in getting Glasser and his orchestra into Roseland Dance City, nor in obtaining, about one year earlier, either of the said contracts of engagement (18-21; 49). Therefore, Glasser questioned the bill, (22) asking WILLARD: "Please let us know on what basis you feel we owe you this money." (22)

WILLARD responded by producing two alleged "booking slips" (14-17), each dated July 10th, 1968 (14-17) and a spurious forged *engagement contract.*•

A comparison of the forged contract with the corresponding authentic contract (18-19) shows that an unsuccessful effort was made to imitate the signatures of Abe Holtzman and Don Glasser; and that a typewriter different from Holtzman's was used to fill in the blanks in the forged "Form B" contract.

As is apparent from their very appearance (14-17), each "booking slip" is an intra-office memo of the terms of an alleged engagement contract.

No affidavit and no submission of facts in this case or in the Article-9, intra-union proceeding was ever sworn to or even merely signed by WILLARD *or by any of its*

• There was no relevant *commissions contract* between WILLARD and Glasser.

officers or employees. All affidavits and fact-submissions before the "Arbitrators" and the State courts were hearsay statements, prepared and signed by a junior attorney in the office of Willard Alexander's law-firm, Kostelanetz & Ritholz, Esqs.

The "booking slips" were dated (14-17) *July 10, 1968, nine days after* Glasser and Holtzman had signed the authentic engagement contracts (18-21); the spurious engagement contract was dated July 1, 1968. WILLARD had failed to send to Glasser the "contracts" it claimed to have negotiated *on July 10, 1968,* until almost one year afterward (22).

The sham contract was not stamped by Local 802 with its approval[1].

When WILLARD made its motion below (8-33); and when WILLARD's attorneys processed its claim under Article 9 of the AFM bylaws; WILLARD used not the *forged document* but the *authentic ones* (which it obtained from Local 802's files) without so much as an affidavit from WILLARD. Yet, when Glasser, in writing, asked (22) for the "basis" of WILLARD's claim, the latter sent to Glasser the forged contract.

On December 30, 1969, Kostelanetz & Ritholz, Esqs., by Edward J. Daus, Esq., first filed the intra-union claim with AFM (11-13). AFM regarded the lawyers' letter (11-13) as a claim under Article 9 of the AFM bylaws (24). Yet the claim letter mentions neither "arbitration" nor Article 9. AFM eventually sent the claim (24) to Don

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[1] Under AFM bylaws such approval is a condition precedent to the validity of the engagement contract (Art. 16, Sec. 1A; Art. 17, Sec. 5; Art. 16, Sec. 19). The authentic contracts properly show Local 802 in the space provided. The forged contract shows Local 339 in that space.

Glasser, who in turn referred it to his attorney for reply (23). That attorney's reply expressly rejected arbitration, stating that the claim presented by Kostelanetz & Ritholz Esqs., as "something *which the Courts should adjudicate*, since what is involved is an alleged commission contract". (emphasis added, 44, ¶30)

The intra-union processing of said claim under Article 9, AFM bylaws, began on December 30, 1969; it ended with the "Award," dated May 15, 1970 (30-31). At no time did Don Glasser in any way participate in that processing or in any "arbitration." Thus, the Article 9 "arbitration" was conducted by AFM entirely in the absence of Glasser.

On or about June 2, 1970, Glasser instituted suit in the United States District Court for the Southern District of New York to vacate the "award". That action (70 Civil 2347) is still pending (40-49; 35; 39). This Federal Court action calls attention to the forgery aforesaid. (44, ¶24). Don Glasser's motion in 70 Civil 2347, to stay State Court proceedings to collect on the basis of the "Award" and to bring Willard into the federal Court action as a defendant, is also pending (since April, 1972) before the Southern District Court of New York.

On December 1, 1970, (almost one year *after* the original, intra-union claim and five months *after* Glasser had instituted 70 Civil 2347 in the United States District Court) the instant motion was instituted below. Mr. Justice Korn's "Order and Decision" was dated June 7, 1971 (6-7). See Appendix.

As appears in 70 Civil 2347, in answer to Glasser's request (22) for the "basis" of Willard's claim, Willard Alexander, on June 25, 1969, wrote:

"June 25, 1969

Mr. Don Glasser
Roseland Dance City
239 West 52nd Street
New York, New York 10019

Dear Don:

I have your very formal letter of June 20th sent to my company wherein you state that you would like an explanation of the statement of June 18th which our Bookkeeping Dept. prepared for you. I don't see any reason for explaining anything, but as long as you have asked for it, it is very easy to explain.

On July 10, 1968 Mr. Gronauer booked you into the Roseland Ballroom. You are booked there on a contract of ours. There is a contract on file in the union and it has been approved. So there is no mistake, *we are attaching a photostat copy of the booking slip and a photostat copy of the contract.* [Emphasis added.]

I hope this explains the matter, and we look forward to receiving your commission immediately.

Very truly yours,

WILLARD ALEXANDER

WA:ka

Enclosures: 2"

With that letter was enclosed a copy of "Booking Slip" No. 9773(16-17) and the *forged* "Form B" contract. Don Glasser replied by letter dated June 28, 1969, reading:

"June 28, 1969

Mr. Willard Alexander
660 Madison Ave.
N. Y. N. Y. 10021

Dear Willard,

We received your letter of June 25th and would like to inform you that your contract is a forgery. That is not my signature or Mr. Holtzman's on the

contract. Nor does it have the approval stamp of the musicians union. This is not a copy of the original contract. Regards,

DON GLASSER"

Willard Alexander responded by letter dated July 1, 1969, reading:

"July 1, 1969

Mr. Don Glasser
c/o Hotel Bryant
Broadway at 54th Street
New York, New York

Dear Don:

In answer to your letter of June 28th wherein you state that our contract is a forgery, I certainly realize the serious charge that you have made and I assume you are aware of the serious charge you have made. There is only one man in our company that handled this contract and that is your friend Herb Gronauer, and if you are charging him with forgery I think you should think very seriously on the consequences of that statement.

The contract and the booking report which we sent you and our contract and booking report both were filled out and handled by him. *We now have in our possession the approved copies of your engagement which the union has had on record and certainly they are different contracts which requires a complete investigation.* However, let me point out to you that the contract is filed and stated in the contract in writing as your booking agent is Willard Alexander, Inc. The date of the so called forged contract of issuance is exactly the same date of the approved union contract.

We expect to be paid for this engagement and any other engagements that were booked through our efforts. We are not mind readers, and you have left no other alternative for me to investigate this quite thoroughly if you insist upon not paying us commissions, *and we accept your statements and will immediately begin to investigate it both through the union channels and otherwise if you insist.* Unless we hear from you with our commissions immediately and by the close of business this Thursday, July 3rd, *we will start immediately to find out what this is all about and hold whomever is responsible for the full consequences, if the facts are as you state.* [Emphasis added.]

Cordially yours,

WILLARD ALEXANDER

WA:ka"

This correspondence was not submitted to the "Arbitrators".

Glasser, whose engagements take him into all States of the Union, has no labor contract with any union.

Reasons for Granting the Writ

(1) The decisions below conflict with the meaning and legislative intent of section 101 (a) (4) LMRDA.

The State courts took the position (see last full paragraph of the opinion of the State Court of Appeals) that Section 101 (a) (4) was irrelevant to the "arbitration" mandated as intra-union procedure by the AFM bylaws and by petitioner's membership obligations under said bylaws. Neither the text of the Section, nor its legislative history, supports this position.

The relevant text is clear and unexceptional:

> "No labor organization shall limit the right of any member to institute an action in any court, • • •

> irrespective of whether or not the labor organization or its officers are named defendants in such action * * *: PROVIDED, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal * * * proceedings against such organization * * *"

As a member of AFM, petitioner's right of access to the courts has been barred or at least limited by a compulsory intra-Union procedure by which the AFM and Respondent effectively preempt, with the approval of the State courts, recourse to judicial trial of the issues brought to "arbitration" in this case.

Nothing in the legislative history of the Section changes the plain meaning of the unambiguous statutory text. For example, Senator Goldwater in his "Analysis" of LMDRA (Monday, September 14th, 1959) wrote:

> "Section 101 (a) (4) protects the right of a union member to sue in the courts * * * even if * * * against the union or its officials. This is an absolutely essential safeguard because many union constitutions provide for disciplining any union member who sues the union or its officers. * * *"

Senator Cooper, on September 3d, 1959, stated:

> "* * * Under section 101 (a) (4) * * * the rule of exhaustion of reasonable remedies within a union * * * would be supplanted by an inflexible 4-month period in which to exhaust 'reasonable hearing procedure'."

Senator Kennedy on September 3d, 1959, concluded:

> "* * * So long as the union member is not prevented by his union from resorting to the courts,

> the intent and purpose of the 'right to sue' provision is fulfilled * * *.
>
> "The 4-month limitation in the House bill also relates to restrictions imposed by unions * * *."

Under the State Court's rulings, Article 9, AFM Bylaws, does effectively restrict a member's right to sue; since it requires "arbitration" by members of the AFM International Executive Board (without hearing or cross-examination); and since it prevents resort to the courts by prescribing "arbitration" as the sole means for resolving disputes in which AFM members and AFM-licensed booking agents (among others) become involved.

Respondent instituted the intra-union procedures on December 30th, 1969. The intra-union "Award" came on May 15th, 1970, more than 4 months after said institution. Therefore, petitioner deemed himself justified in starting suit in the Federal Court on June 2nd, 1970. That suit (70 Civil 2347) would be rendered futile if AFM is permitted thereafter to insist that Glasser must abide by the "Award" approved by the State courts; or if the beneficiary of the "Award" (Willard) is allowed to confirm the "Award" by a proceeding commenced in the State Court five months after institution of Glasser's Federal Court action (70 Civil 2347) to vacate the "Award." The Court of Appeals errs when it says that "the compulsory arbitration rules here in question in no way limit that right" (*i.e.*, the right given petitioner by section 101 (a) (4) LMRDA). It is impossible to reconcile compulsory arbitration under Art. 9, AFM Bylaws, with the cited Section of LMRDA.

Here there was no agreement to arbitrate between Willard and Glasser (who expressly rejected arbitration). There was simply a union bylaw which well nigh universally *mandates* "arbitration", according to the Court of Appeals of the State of New York; despite petitioner's

express rejection in writing of arbitration and his express preference for a judicial tribunal where witnesses could be confronted, examined and cross-examined. According to the State Court petitioner was locked into an intra-union, *compulsory,* "arbitration" proceeding, which permitted no examination* or cross-examination of witnesses, without ability to escape to the courts. This is exactly one of the situations forbidden by section 101 (a) (4) LMRDA.

2. *The national scope of the intra-union procedure approved by the State Court.* The AFM and its more than 600 local unions apply their compulsory "arbitration" procedure *nationally* to *all* orchestra-leader employers (whom it regularly coerces into union membership), *all* employee musicians, *all* booking agents and *all purchasers of music.* The latter are regularly required, if they wish performances by Union musicians (and there are very few musicians who are not AFM members), to sign a "Form B" contract prepared and mandated by AFM. That "Form B Contract" expressly incorporates *all AFM Bylaws,* including those requiring the "arbitration" procedure aforesaid, which forbids or prevents any hearing or cross-examination before its alleged "arbitrators". In short, the AFM's compulsory "arbitration" procedures are imposed, for all practical purposes, *on the entire musical industry of the U.S.A.;* and this has been going on for more than 40 years. Thus, the problem is national in scope and coextensive with a national industry.

3. *The exclusive jurisdiction of the federal court.* The New York Court of Appeals also neglected the rules laid down by this Court in such cases as *Wilson* v. *Schnettler,* 365 U. S. 381; *Harkrader* v. *Wadler,* 172 U. S. 148; *Prout* v. *Starr,* 188 U. S. 537. Glasser's Federal-Court action (70 Civil 2347) to vacate the "Award" was instituted June 2nd, 1970. Willard's motion to confirm the

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* Apparently, on this view, a man can resign from his union; but not from an "implied" agreement to arbitrate; *i.e.,* spelled out of Union Bylaws.

"Award" was initiated December 30th, 1970. Therefore, the United States District Court for the Southern District of New York had jurisdiction over confirming or vacating the "Award" (on which Willard's claim was wholly based) five months before the State Court proceeding was commenced. The Court whose jurisdiction first attached has exclusive and complete jurisdiction.

AFM has a *compulsory* procedure (so recognized as such by the Court of Appeals of New York State) which in effect deprived Glasser of his right to litigate in the courts the question whether there was a *contract for commissions** between Willard and Glasser. In an intra-union procedure which lasted more than four months, AFM presumed to give Willard an "Award" which in effect (according to the State courts) strips Glasser of effective recourse to the courts. And when Glasser tried to vindicate his rights under the LMRDA, the Court of Appeals of New York permitted a State Court, whose jurisdiction was invoked (*five months after the U. S. District Court had acquired prior and exclusive jurisdiction*) to disregard a rule repeatedly laid down by this Court to regulate conflicting claims of jurisdiction between State and Federal courts.

4. *Undue process under the Fourteenth Amendment.* The "arbitrators" and the State Court acted throughout upon the basis of no affidavit or statement signed by Willard. They were satisfied with the hearsay averments contained in affidavits and papers signed only by Willard's attorneys. This is, therefore, a hornbook case of violation of due process under the Fourteenth Amendment. Under no sound theory of law has hearsay evidence been deemed an adequate basis for adjudication or quasi-adjudication. This proposition needs no citation of authorities.

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* Which is not the same as an *engagement contract* ("Form B") between the orchestra leader and the purchaser of music.

As Article 9, AFM Bylaws, makes clear the alleged "arbitration" allowed no opportunity for hearing and for cross-examination of witnesses. It was for this reason that Glasser, by his attorney, expressly rejected the AFM compulsory "arbitration" procedures.

Under the AFM's prescribed procedures Glasser would have to: (a) waive the "taking of oaths" by the "arbitrators" (See Appendix, Art. 9, Sec. 6 (C) (1) through (10), AFM Bylaws); (b) consent "to the introduction and submission of evidence by the Board in the form of unsworn written statements" (Art. 9, Sect. 6 (C) (3) AFM Bylaws); (c) waive "the taking of oral testimony and the presentation of oral argument before the Board" (*ibid.*); (d) agree "that the Board shall not be bound by rules of law nor rules of evidence • • •"; (e) consent "to the consideration of evidence and to the making of any award by the members of the Board severally without the holding of a conference" (Art. 9, section 6 (c) (5), Bylaws); etc. as appears from Article 9, AFM Bylaws, set forth in the Appendix.

Finally, the only tribunal of "arbitrators" allowed to petitioner (and to all who have disputes subject to this all-encompassing, compulsory, intra-union "arbitration" procedure) is the International Executive Board. If the contest involved a grievant who, *like petitioner*, had earlier conducted litigation against the AFM and its Locals; or if the grievant were a non-member in contest with a member, the tribunal remains the same, despite the requirements of impartiality: the top AFM officials are the "arbitrators". This is clearly a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other [quasi-] judicial, [and] necessarily involves a lack of due process of law • • •" (to somewhat paraphrase *Tumey* v. *Ohio*,

273 U. S. 510 (1927) at p. 534) See also *Ward* v. *Village of Monroeville, Ohio,* No. 71-496, decided November 14th, 1972 by this Court.

5. *The national effect of the decision below.* This case has national significance in another respect. The highest court of New York State (to say nothing of other States, like California) has now placed its nationally influential *imprimatur* upon an intra-union procedure spuriously called "arbitration", and made compulsory by Article 9, AFM Bylaws, despite the undue process which bristles from that Article. The Court of Appeals of the State of New York rules additionally that Section 101 (a) (4) LMRDA must be subordinated to AFM's intra-union procedures and that a State court, which took jurisdiction over the alleged "Award" herein five months *after* a United States District Court had taken jurisdiction over the same "Award", may in effect oust the federal court of its jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of New York.

January 30, 1973.

Respectfully submitted,

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[APPENDICES FOLLOW] .

APPENDIX A

Decision of the Court of Appeals State of New York

No. 259

In the Matter

of

The Arbitration between WILLARD ALEXANDER, INC.,

Respondent,

and

Member DON GLASSER,

Appellant.

Chief Judge FULD. In this proceeding to confirm an award, the question posed is whether the obligation of the parties to abide by the provisions of a labor union's constitution and by-laws, requiring the submission of disputes to arbitration, constitutes a "written agreement" between them, within the sense of CPLR 7501, to arbitrate their differences.

The respondent, Willard Alexander, Inc., is a booking agent "licensed" by the American Federation of Musicians of the United States and Canada (AFM) to do business with that organization's members. The appellant, Don Glasser, is an orchestra leader, who was a member of the AFM. In July of 1968, Alexander, at Glasser's request, arranged for the latter to perform two six-week

engagements at Roseland Dance City in Manhattan. As indicated on its "booking slips" which memorialized these arrangements, Alexander was to receive as a commission 10% of the total price paid to Glasser by Roseland.[1] Glasser opened the first of these engagements in June, 1969, and, shortly thereafter, Alexander sent him a bill for $3,000, representing its 10% commission to cover both bookings. Glasser refused to pay, whereupon Alexander requested the union's international executive board to adjudicate its claim. In May, 1970, following arbitration proceedings in which the appellant Glasser did not participate, the board awarded Alexander the full amount claimed. Some months later, the court at Special Term, upon a motion by Alexander, confirmed the award.[2] A divided Appellate Division affirmed the resulting judgment (38 A D 2d 546) and the appeal is before us as of right (CPLR 5601, subd. [a]).

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[1] In the two "engagement contracts" relating to these scheduled performances which Glasser subsequently executed with Roseland Amusement Co., the orchestra leader acknowledged the booking services performed by Alexander by clearly designating the latter under his own signature on each contract as his "Booking Agent." Each contract, we note in passing, incorporated by reference the "By-Laws, Rules and Regulations of the" AFM. Thus, each provided—under that section of the contract entitled "Additional Terms and Conditions"—that "there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-Laws, Rules and Regulations of the Federation". Following their execution, the union stamped both contracts "Approved".

[2] Prior to Alexander's application in the Supreme Court, Glasser brought an action in the Federal District Court *against the union* (under section 102 of title I of the Labor-Management Reporting and Disclosure Act of 1959) for, among other things, a judgment "vacating and annulling" the award. That action is still pending.

Appendix A

Section 6 of article 9 of the union's constitution and by-laws—captioned "Claims and Arbitrations"—requires that disputes "arising out of" contracts between members of the union and booking agents "shall be heard, adjudicated and determined • • • only by the International Executive Board of [the AFM]." It further provides that a proceeding before the union's executive board may be initiated "upon the request or demand of any party." The appellant Glasser necessarily assented to these rules, since it is well settled that, when a person becomes a member of a labor organization, or any other association, he thereby agrees, as a matter of law, to abide by the duly enacted provisions of its constitution and by-laws unless they are contrary to good morals or public policy or otherwise illegal. (See, e.g., *Machinists* v. *Gonzales*, 356 U. S. 617, 618; *Maltese* v. *Dubinsky*, 304 N. Y. 450, 455; *Nilan* v. *Colleran*, 283 N. Y. 84, 89; *O'Keefe* v. *Local 463 of Assn. of Plumbers*, 277 N. Y. 300, 304; *Polin* v. *Kaplan*, 257 N. Y. 277, 281; *Fritsch* v. *Rarback*, 199 Misc. 356, 359.) As this court wrote in the *O'Keefe* case (277 N. Y. 300, 304, *supra*), "The constitution and by-laws of the • • • union define the relations of the union and its members; the powers of the union officers and committees and the rights of the members." And, we note in addition, Glasser actually agreed in his written application for union membership, that he would "be bound" by that organization's "Constitution [and] By-Laws." The respondent Alexander also agreed to abide by the union's arbitration rules embodied in article 9 when—in order to become "licensed" by the union—it signed a "booking agent agreement" with that body.

In our view, the mutual obligation of the parties in the present case to observe the union's arbitration provisions clearly constitutes, as between themselves, a "written

agreement" to arbitrate their dispute within the meaning of CPLR 7501. Ample support for this conclusion is found in the cases.[3] In *Merrill Lynch, Pierce, Fenner & Smith* v. *Grisenbeck* (28 A D 2d 99, affd. 21 N Y 2d 688), for instance, the plaintiff and the defendant were members of the New York Commodity Exchange. Section 232 of that body's by-laws required arbitration of any "'claims, dispute, difference or controversy'" between members "'arising out of any transaction in commodities made on the Exchange'" (28 AD 2d, at p. 100). A dispute subsequently arose under a "'commodity account agreement'" between the two, when the plaintiff, as the defendant's broker, engaged in certain losing transactions on the London Metal Exchange and sought to saddle the defendant with the ensuing losses. The plaintiff brought an action for that purpose in the Supreme Court and the defendant promptly moved for an order dismissing the complaint and compelling arbitration pursuant to subdivision (a) of CPLR 7503. As in the present case, the contract in *Griesenbeck* out of which the dispute arose contained no agreement to arbitrate. However, and it is of high significance, the Appellate Division proceeded on the implicit and unchallenged assumption that there was a valid agreement to arbitrate, since both parties, by vir-

---

[3] See, e.g., *Merrill Lynch, Pierce, Fenner & Smith* v. *Griesenbeck*, 28 A D 2d 99, affd. 21 N Y 2d 688; *Matter of Ghiron (Mayr)*, 19 A D 2d 54, 55; *Hutton & Co.* v. *Bokelmann*, 56 Misc. 2d 910; *Coenen* v. *Pressprich & Co.*, 453 F. 2d 1209, 1211-1212; *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 451 F. 2d 838, 840-841, affg. 320 F. Supp. 193, 194; cf. *Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766, 769-770.

tue of their membership in the Exchange, had agreed to observe its rules concerning arbitration.[4]

The *Griesenbeck* case is indistinguishable in principle from the case now before us. The sole difference is that here only the appellant was compelled by *virtue of his union membership* to observe the union's arbitration rules. It is, however, quite clear that the respondent was equally obligated to observe those rules because of the booking agent agreement which it had signed with the union. In short, each party was bound just as if *both* had been union members. It follows, therefore, that a valid agreement had been made to arbitrate their dispute.

We have considered the other points advanced by the appellant and find them without substance. It is enough to say that his reliance on Section 101 (subd. [a], par. [4]) of the Labor-Management Reporting and Disclosure Act (U. S. Code, tit. 29, § 411, subd. [a], par. [4]) as a ground for setting aside the award indicates a misreading of the statute and its purpose. That provision, as the House Committee Report accompanying the act makes clear (H.R. Rep., No. 741, 86th Cong., 1st Sess. 30 [1959]), was merely designed to protect the right of a union member to proceed in court against the union or its officers. Manifestly, the arbitration rules here in question in no way limit that right.

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[4] Indeed, the sole issue in that case was whether the "scope" of the agreement to arbitrate covered transactions not only on the New York Commodity Exchange but on the London Metal Exchange as well. The Appellate Division decided that it did (28 A D 2d, at p. 103) and, accordingly, directed "that the parties proceed to arbitration" (28 A D 2d, at p. 104). As indicated, the Court of Appeals affirmed (21 N Y 2d 688, *supra*).

Appendix A

The order appealed from should be affirmed, with costs.

Judges BURKE, SCILEPPI, BERGAN, JASEN and GIBSON concur.

Order affirmed.

APPENDIX B

Article 9—Claims and Arbitrations

SECTION 1. A member of the Federation shall at all times have the right to sue or make claim through his local union or the Federation, as the case may be against any leader, agent, employer or whoever it may be, for any amount resulting from failure to receive his salary, for violation of contract or agreement, or for any difference in price actually received by him for an engagement and the price established by his local union or the Federation for same.

SECTION 2. Neither the Federation nor any local shall enforce a claim against any member unless same is connected with or arises from the profession of music as engaged in, practiced and carried on by members of the Federation.

SECTION 3. All claims against defaulting employers must be filed with the International Secretary-Treasurer within three months after the default occurs. A leader who fails to comply with this law may be held personally responsible for full payment of all money due members of his orchestra and may not be entitled to the assistance and protection of the Federation, but such failure of the leader shall not absolve the defaulting employer.

SECTION 4. A claim referred to the Federation for collection against an employer for non-payment of salaries, breach of contract, or any other valid reason whatsoever cannot be settled privately between appellant and defendant unless the Federation agrees to same.

SECTION 5. Locals are privileged to take whatever action and means available, even to the restraint of all fur-

ther service, in their efforts to obtain collection of moneys due, providing a careful investigation has been made and no doubt exists with the Federation as to the validity of the claim.

SECTION 6. Every agreement or contract covering, dealing with, relating to, or affecting the performance of services as a musician by a member of the American Federation of Musicians (including but not limited to agreements or contracts providing for management or booking services for such member or engagements or employment for such member) shall be deemed to include the following provisions:

(A) Every claim, dispute, controversy or difference (all of which are herein called "grievance") arising out of, dealing with, relating to, or affecting the interpretation or application of this contract or the violation or breach or threatened violation or breach thereof, whether between (1) an employee who is a member of the American Federation of Musicians (herein called "Federation") and the employer or purchaser or services hereunder, (2) such member and the booking agent of the engagement provided for hereunder, (3) such employer or purchaser and such booking agent, or (4) two or more booking agents shall be heard, adjudicated and determined as follows:

(1) If any such grievance involves or relates to booking agents, traveling bands, recording, radio or television activities, or any other matter within the sole competence of the Federation pursuant to its Constitution, By-laws, rules or resolutions, as distinguished from matters within the competence of the locals thereof, it shall be adjudicated and determined only by the International Executive Board of said Federation (herein called "Board").

Appendix B

(2) Any other such grievance shall be initially adjudicated by the person, persons or body specified by the rules, By-laws or practices of the local of said Federation in whose jurisdiction the services have been or are to be performed, in accordance with the procedures adopted in such rules or By-laws or adhered to under such practices. Any party to such local adjudication may appeal from the determination thereof to the Board within thirty days from the date on which such party is notified of such local determination or within such additional time as the President of the Federation or the Board may specify. On such appeal, the Board shall receive the evidence taken by such local person, persons or body and, in its discretion, may receive additional evidence from any party. Pending such appeal, the President of the Federation may stay the award on such terms and conditions as may be deemed proper, including but not limited to the deposit of adequate security with the Federation.

(3) The award of the Board on any grievance submitted to it in accordance herewith, whether in the first instance or on appeal from the decision of such local person, persons or body shall be final and binding upon all parties. The award of such local person, persons or body in any adjudication from which an appeal is not taken to the Board as above provided shall be final and binding upon all parties.

(B) The failure to perform (or the breach of any other type) of any contract or agreement, between such member and such employer or purchaser of services, or between such member and such booking agent, or between such employer or purchaser of services and such booking agent, by any party to such contract or agreement

shall not have the effect of terminating the obligations, under the provisions of this Section 6, of such party or of any adverse party or of any other party to such contract or agreement. Such failure to perform or such breach of any other type, since it is included within the definition of "grievance," shall be heard, adjudicated and determined as provided in this Section 6 upon the request or demand of any party.

(1) The adjudication of grievances before the Board under the provisions of this Section 6 shall be the sole and exclusive remedy for breach of contract by employees (or performers of services), employers (or purchasers of services) and booking agents.

(2) As used in the Section 6, the term "booking agent" shall include a booking agent, an agent, a personal representative, a manager, a personal manager and a promoter.

(3) A partial performance, or acts in lieu of performance of an award issued pursuant hereto shall not constitute satisfaction of such award even though accepted as such by the party entitled to performance under the award unless such agreement, settlement or compromise shall be approved by the person, persons or body issuing the award.

(C) Each party so required to settle grievances hereby:

(1) agrees that said Board shall have jurisdiction to determine whether any matter upon which determination has been demanded constitutes such a claim, dispute, controversy or difference dealing with, relating to or affecting the rendition of services performed or to be performed hereunder by any member of the American Federation of Musicians, or providing management or booking services for such member, or providing engagements

or employment for such member; and whether such claim, dispute, controversy or difference involves or is related to a matter within the sole competence of the Federation pursuant to its Constitution, By-laws, rules or resolutions as distinguished from matters within the competence of locals thereof:

(2) waives the taking by the members of the Board of any arbitrator's oath required by law;

(3) consents to the introduction and submission of evidence to the Board in the form of unsworn written statements, and waives the taking of oral testimony and the presentation of oral argument before the Board;

(4) agrees that the Board shall not be bound by rules of law nor by rules of evidence prescribed by any court or administrative agency;

(5) consents to the consideration of evidence and to the making of any award by the members of the Board severally without the holding of a conference;

(6) agrees that any award may be made by a majority of the members of the Board voting thereon and that notice of any award of the Board signed by the Secretary-Treasurer of the Federation or an assistant designated by him shall constitute the formal award of the Board, neither notarization, acknowledgement nor certification being necessary, but that the Board in its discretion may issue an award signed and acknowledged by the Secretary-Treasurer of the Federation or his designated assistant and may do so at any time and even though notice of the award signed by said Secretary-Treasurer or his designated assistant has already been issued;

(7) agrees that the courts of the State of New York and of the state in which any party to such submission

resides shall have jurisdiction over such parties to adjudication in reference to any matter arising out of any adjudication held pursuant hereto, including but not limited to the confirmation of the award of the Board and the enforcement thereof by entry of judgment thereon or by any other legal remedy, and that an award of the Board may be enforced as either the award of a common law proceeding or of a statutory procedure; *and any court in Canada of competent jurisdiction in the Province, County or District in which any party to such submission resides shall have jurisdiction as aforesaid and the law of such Province shall apply;*

(8) agrees that the mailing (registration being unnecessary) by the Secretary of the Federation of any demand for adjudication, notice of hearing or any other notice, or of any other paper connected with a proceeding pursuant to this Section 6 of Article 9 or with such a judicial proceeding, properly addressed and with prepaid postage, shall constitute due and proper service of such demand or paper;

(9) agrees that any adjudication by the Board shall be conducted in accordance with such rules as said Board may adopt from time to time;

(10) agrees that the Board may, in making any adjudication, take into account the customs, practices, standards and conditions of the industries, trades or professions in which musicians perform, of which the members of the Board have knowledge without the necessity of any evidence with respect thereto being adduced in the proceeding before the Board.

SECTION 7. Where the plaintiff or the defendant introduces evidence of unusual or great volume, the International Secretary-Treasurer shall have authority to in-

sist that fifteen copies of said evidence be furnished for the purpose of preparing the claim for the International Executive Board.

SECTION 8. Where the Board has rendered its initial award in an arbitration proceeding, whether or not upon the default of any party, any party to the proceeding may request a reopening of that initial award upon the ground of prejudicial error or to submit new evidence, not available at the prior proceeding. An application for a reopening must be submitted in writing to the International Secretary-Treasurer not later than 90 days after the date of the Board's award, and shall set forth the evidence relied upon. The International Secretary-Treasurer, in his discretion, may grant or deny the application after reviewing the evidence submitted.

APPENDIX C

Order and Deicsion of Special Term Confirming Award

Supreme Court of the State of New York, Special Term Part 1, New York County at the Courthouse hereto New York, New York, 10007.

Present:

Hon. Hyman Korn, Justice.

In the Matter

of

The Arbitration Between Willard Alexander, Inc.

Petitioner,

against

Member Don Glasser,

Respondent.

The following papers numbered 1 to 22 read in this motion, submitted No. 165 on Calendar of Dec. 15, 1970.

	Papers Numbered
Notice of Motion, Exhibits and Affidavits Annexed	1-15
Answering Affidavit See Memorandum of Law	
Replying Affidavit	16
Affidavit See Supplemental Memo & Exhibit	17-18
Exhibits	19-22

Appendix C

Upon the foregoing papers this Application by petitioner for an order confirming an arbitrator's award and for judgments in accordance therewith is granted.

Respondent Glasser was a member of Local 802 of the American Federation of Musicians. By virtue of such membership, respondent agreed in advance the manner in which any claim arising under an engagement agreement is to be resolved. Whether there has been an abridgment of respondent's rights under section 101 of the Labor Management Reporting and Disclosures Act is a matter to be resolved in petitioner's action in the Federal court.

Settle judgment.

Dated June 7 1971

H. K.
J. S. C.

Briefs: Respondent's ✓
County Clerk's No. (illegible)
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FEB 27 1973
MICHAEL RODAK, JR., CLERK

To be argued by
BORIS KOSTELANETZ

Supreme Court of the United States

72-1055

IN THE MATTER

of

The Arbitration Between WILLARD ALEXANDER, INC.,

Respondent,

and

MEMBER DON GLASSER,

Petitioner,

Before the INTERNATIONAL EXECUTIVE BOARD, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

In the Matter

of

The Arbitration Between Willard Alexander, Inc.,

Respondent,

and

Member Don Glasser,

Petitioner,

Before the International Executive Board, American Federation of Musicians of the United States and Canada.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

The $3,000. controversy below arose out of a dispute between Willard Alexander, Inc., Respondent, a booking agent, and Don Glasser, Petitioner, an orchestra leader and client of Respondent, with respect to commissions due on two engagements at Roseland Dance City (9).*

On July 10, 1968, at the request of Petitioner, the head of the Chicago office of Respondent put through, in the normal course of business, two booking slips for Petitioner, each of which were for six week engagements at Roseland and provided for the standard 10% commission

* Numbers in parentheses refer to pages in the Record on Appeals before the Court of Appeals of the State of New York.

to Respondent (11, 12, 14 and 16). The contracts, issued with respect to these engagements, being standard contract blanks of the American Federation of Musicians (hereinafter referred to as "A F of M") were dated as of July 1, 1968, bear the signatures of a representative of Roseland, the employer, of Petitioner and Respondent, designate Respondent as "Booking Agent" and were approved by the F of M (18 and 20). Although Petitioner thereafter performed both engagements, he failed to pay any part of the commissions due to Respondent (12-13).

At all relevant times, Petitioner was a member of the A F of M (Petitioner's Brief, pp. 4 and 12). Respondent was a signatory to a Booking Agent Agreement between it and the A F of M, which agreement was made for the benefit of all members of the A F of M, including Petitioner. The contracts referred to above expressly incorporated by reference the "By-laws, Rules and Regulations of the Federation" (18 and 20). By virtue of such membership of Petitioner in the A F of M, the Booking Agent Agreement between Respondent and the A F of M and the By-laws of the A F of M, both Petitioner and Respondent had certain rights and obligations, *vis a vis*, arbitration of grievances between them before the International Executive Board of the A F of M.

Consequently, on December 30, 1969, Respondent instituted an arbitration proceeding before the A F of M in accordance with the Constitution and By-laws thereof (32) with respect to the foregoing controversy (11-22). Thereafter, and after due consideration of the submission by both sides, the A F of M, on May 15, 1970, issued an official award in the sum of $3,000 to be paid by Petitioner to Respondent (29-31).

No application having been made by Petitioner either to reopen the proceeding before the A F of M or before Special Term of the Supreme Court of the State of New

York to vacate or modify said award within the time specified in § 7511(a) CPLR, Respondent, on December 15, 1970, moved Special Term for confirmation of the award (8), which motion was granted and an order entered on January 5, 1971 (6-7)* and judgment thereon was entered on March 18, 1971 (4-5).

The Appellate Division, First Department, Supreme Court of the State of New York, affirmed the judgment by its order dated December 21, 1971 (58-59). The memorandum decision of that court is reported at 38 Ap. Div. 2d 546, 327 N.Y. Supp. 2d 282 (1st Dept. 1971).

Thereafter, and on November 1, 1972, the Court of Appeals of the State of New York unanimously affirmed, 31 N.Y. 2d 270, 338 N.Y.S. 2d 609 (1972).

While this case was before the Court of Appeals and prior to the aforesaid affirmance, Petitioner moved the United States District Court for the Southern District of New York (a) for leave to add Respondent as a defendant to Petitioner's pending action against the A F of M which action sought to vacate the award of the A F of M and (b) for a preliminary injunction against enforcement of the arbitration award by both Respondent and the A F of M. Subsequent to the affirmance by the Court of Appeals, the District Court, by its decision and order dated January 31, 1973, denied Petitioner's prayer for relief in its entirety and dismissed the action, even as against the A F of M. Consequently, the action (70 Civil 2347) referred to by Petitioner in his Brief at page 8 is no longer pending. The District Court's decision and order appears in the Appendix hereto, since it has not yet been reported.

Petitioner served the within Petition for Certiorari on January 29, 1973.

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* The date of the order and decision of Special Term is mistakenly printed as June 7, 1971 in Petitioner's Record on Appeal.

In the "Statement of the Case" set forth in Petitioner's Brief (pp. 4-11), various allegations are made, relating to the negotiation and execution of the two engagement contracts in question, which neither were presented by Petitioner in the arbitration proceeding before the A F of M nor to Special Term in opposition to Respondent's motion to confirm. Petitioner makes reference both to a "forged" contract which he asserts is the subject of a suit in the United States District Court for the Southern District of New York (Petitioner's Brief, pp. 6-8) and to correspondence between the parties concerning such contract (Petitioners' Brief, pp. 8-11). As stated hereinabove, the District Court action has been dismissed. Moreover, the correspondence referred to neither was submitted to the A F of M nor to Special Term and finds no proper place here. In any event, the spurious allegations of forgery are wholly immaterial and without validity in view of Appellant's concession both below and in his Brief, at p. 7, that only authentic engagement contracts (18 and 20) were submitted to and considered by the A F of M in the arbitration proceeding. Not constituting part of the record below, it is assumed that this Court will give neither credibility nor consideration to these so-called allegations.

Reasons for Denying the Writ

1. Both Federal and New York State law harmoniously and unanimously are clear that where, as here, the constitution and by-laws of an association (32) mandate arbitration of controversies between a member and a non-member at the instance of the latter, the member by virtue of his membership therein is bound to arbitrate the dispute as a matter of law. *Axelrod & Co.* v. *Kordich, Victor & Neufeld,* 451 F.2d 838 (2d Cir. 1971), *affirming* 320 F. Supp. 193 (S.D.N.Y. 1970); *Brown* v. *Gilligan, Will & Co.,* 287 F. Supp. 766 (S.D.N.Y. 1968); *Tanbro Fabrics Corp.* v. *Deering Milliken, Inc.,* 29 N.Y. 2d 690, 325 N.Y.S. 2d 419

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(1971), *affirming* 35 A.D. 2d 469, 318 N.Y.S. 2d 764 (1st Dept. 1971); *Merrill, Lynch, Pierce, Fenner & Smith* v. *Griesenbeck*, 21 N.Y. 2d 688, 287 N.Y.S. 2d 419 (1967), *affirming* 28 A.D. 2d 99, 281 N.Y.S. 2d 580 (1st Dept. 1967); *Gem Music Corp.* v. *Taylor*, 294 N.Y. 34 (1945); *Nilan* v. *Colleran*, 283 N.Y. 84 (1940); *O'Keefe* v. *Local 463*, 277 N.Y. 300 (1938); *Polin* v. *Kaplan*, 257 N.Y. 277 (1931); *M.R. Glass Inc.* v. *Auto Glass Dealers Ass'n.*, 49 Misc. 2d 263, 267 N.Y. Supp. 2d 307 (Sup. Ct. N.Y. Co. 1966); *Lowe* v. *Feldman*, 11 Misc. 2d 8, 168 N.Y.S. 2d 674 (Sup. Ct. N.Y. Co. 1957), *affirmed* 174 N.Y. Supp. 2d 949 (1st Dept. 1958); *Overton-Bey* v. *Jacobs*, 22 Misc. 2d 465, 131 N.Y. Supp. 2d 31 (Sup. Ct. Kings Co. 1954); *Fritsch* v. *Rarback*, 199 Misc. 356, 98 N.Y. Supp. 2d 748 (Sup. Ct. N.Y. Co. 1950); *Weinstock* v. *Ladisky*, 197 Misc. 859, 98 N.Y. Supp. 2d 85 (Sup. Ct. N.Y. Co. 1950); *Ballas* v. *McKiernan*, 63 Misc. 2d 432, 312 N.Y. Supp. 2d 204 (Civil Ct. Queens Co. 1970). Thus, Petitioner was obligated to arbitrate and was bound by the arbitration award as all courts below so held. Indeed, Respondent as a booking agent licensed by the A F of M and as a signatory to a Booking Agent Agreement with the A F of M, similarly was bound to arbitrate. *King Records, Inc.* v. *Brown*, 21 A.D. 2d 593, 252 N.Y.S. 2d 988 (1st Dept. 1964), *modifying* 44 Misc. 2d 183, 253 N.Y.S. 2d 431 (Sup. Ct. N.Y. Co. 1964); *Sperling* v. *Newtown Laundry Service, Inc.*, 264 App. Div. 878, 35 N.Y. Supp. 2d 588 (2d Dept. 1942). And lastly, the engagements contracts, which Petitioner signed and out of which the controversy below arose, incorporated by reference the By-Laws of the A F of M, containing the mandatory arbitration provisions, which, without more, bound Petitioner to arbitrate. *Level Export Corp.* v. *Wolz, Aiken & Co.*, 305 N.Y. 82 (1963).

2. The compulsory arbitration procedure of the A F of M did not deprive Petitioner of his access to the courts, in violation of Section 101(a)(4), Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 411(a)(4)].

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That section is referrable to internal civil and political rights of union members *vis-a-vis* their union, *Straus* v. *International Brotherhood of Teamsters,* 179 F. Supp. 297, 300 (E.D. Pa. 1959), and not to controversies between union members and their employers or business agents, *Gross* v. *Kennedy,* 183 F. Supp. 750, 756-757 (S.D.N.Y. 1960), even where a conspiracy between the union and the employer or business agent is alleged. *Abrams* v. *The Carrier Corp.,* 434 F. 2d 1234, 1250 (2d Cir. 1970); *Thompson* v. *N.Y. Central R.R. Co.,* 361 F.2d 137, 145 (2d Cir. 1966); *Fogg* v. *Randolph,* 244 F. Supp. 885 (S.D.N.Y. 1962).

Not only did the Appellate Division and the Court of Appeals below so conclude, but the United States District Court for the Southern District of New York, the very court to which Petitioner sought access, dismissed his action for his failure to first exhaust reasonable internal arbitration procedures within the union framework, as required by § 101(a)(4). The decision and order of the District Court is appended hereto.

3. Petitioner, *for the first time,* has raised a question concerning the constitutionality of the arbitration procedures of the A F of M, namely, whether the same are violative of the due process clause of the Fourteenth Amendment. Since the constitutionality of these procedures was not raised in any court below, Petitioner is precluded from such assertion in this Court. *Ellis* v. *Dixon,* 349 U.S. 458, 99 L.Ed. 1231 (1954) [writ dismissed as improvidently granted], *rehearing denied,* 350 U.S. 855, 100 L.Ed. 759 (1955). Moreover, in his written application for membership in the A F of M, Petitioner agreed to ". . . support, conform to and be bound by the Constitution, By-Laws . . . of the American Federation of Musicians . . ." and thereby expressly waived any constitutional right pertaining to the arbitration procedures therein. *United States* v. *Armour & Co.,* 402 U.S. 673, 29 L. Ed. 2d 256 (1971); *Boddie* v. *Connecticut,* 401 U.S. 371, 28 L. Ed. 2d 113 (1971).

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment and opinion of the Court of Appeals of the State of New York should be denied.

February 23, 1973.

Respectfully submitted,

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Edward J. Daus, Esq.
Of Counsel

APPENDIX

Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 2347

DON GLASSER,

Plaintiff,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

GRIESA, J.

The plaintiff in this action, Don Glasser, is an orchestra leader and a member of defendant American Federation of Musicians ("AFM"). The dispute in this action, and in related arbitration and New York state court proceedings, is about whether plaintiff is obligated to pay a $3,000 commission for an orchestra engagement to a booking agent, Williard Alexander, Inc. The complaint in this action seeks to vacate, and to prevent enforcement of, an arbitration award made by AFM's International Executive Board directing plaintiff to pay Alexander the $3,000. Federal jurisdiction is invoked under Sections 101 and 102 of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 411 and 412.

Plaintiff moves for a preliminary injunction against the enforcement of the arbitration award. Plaintiff also moves for leave to serve an amended complaint. While the

original complaint was directed solely to AFM, the proposed amended complaint would add Alexander as a defendant and would assert against Alexander a claim for damages for allegedly bringing about an unlawful arbitration proceeding.

The motion is denied in all respects. The arbitration proceeding and award have been held to be valid by the New York Court of Appeals. *In the Matter of the Arbitration Between Willard Alexander, Inc., Respondent, and Member Don Glasser, Appellant*, 31 N.Y. 2d 270 (Nov. 1, 1972). That decision is res judicata on all essential points, including the issue of violation of federal labor law raised in this action. Even in the absence of res judicata, it is clear that there are no valid claims under the provisions of the LMRDA relied upon by plaintiff.

In addition to denying plaintiff's motion I am directing that the action be dismissed. The same reasons which dictate denial of plaintiff's motion also dispose of this case in its entirety.

The controversy arises out of two engagements for plaintiff and his orchestra to perform at Roseland Dance City in New York. The contracts for these engagements were signed July 1, 1968 by plaintiff and a representative of Roseland. On each contract plaintiff listed Willard Alexander, Inc. as booking agent. Alexander is a booking agent licensed by AFM to do business with that organization's members.

The first engagement at Roseland was performed in June and July 1969 and the second engagement was performed in December 1969 and January 1970. At the time of the first engagement Alexander requested that plaintiff pay a $3,000 commission. Plaintiff refused, claiming that Alexander did in fact act as a booking agent on these engagements.

Section 6 of Article 9 of AFM's bylaws provides that every contract relating to booking services for members

shall be deemed to include a provision that disputes about the conract between a member and a booking agent shall be arbitrated by the International Executive Board of the AFM. Section 6 further provides that the courts of the State of New York, or of any state in which a party to an arbitration resides, shall have jurisdiction in reference to any matter arising out of the arbitration.

On December 30, 1969 Alexander instituted an arbitration proceeding before the International Executive Board of AFM seeking recovery of the $3,000 claimed from plaintiff. On January 26, 1970 an AFM official sent a letter notifying plaintiff of the proceeding. At this time plaintiff was on the road with his orchestra, and did not receive the letter until February 26, 1970. On the latter date plaintiff's attorney wrote AFM stating the view that the matter was something for the courts to adjudicate. Neither plaintiff nor his attorney participated in the arbitration proceeding. On May 15, 1970 the International Executive Board of AFM handed down its award, holding that Alexander was entitled to recover $3,000 from plaintiff. A copy of this award was sent promptly to plaintiff's attorney.

On June 2, 1970 plaintiff commenced his action in this Court.

On December 15, 1970 Alexander moved in Supreme Court, New York County, to confirm the arbitration award. This motion was made under C.P.L.R. § 7510, which permits an application to confirm an arbitration award to be made within a year.

Plaintiff appeared in the New York court proceeding and opposed confirmation of the award. The motion to confirm was granted in Special Term. Plaintiff appealed, and a divided Appellate Division affirmed on December 21, 1971. 38 A.D.2d 546, 327 N.Y.S.2d 282. The Court of Appeals unanimously affirmed on November 1, 1972, with Chief Judge Fuld writing the opinion.

In the state court proceedings, plaintiff argued (1) that there was no binding agreement to arbitrate the dispute in question, and (2) that Section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4), would be violated by enforcement of the requirement in the AFM by laws to submit the dispute to arbitration. The latter statute is concerned with ensuring that labor organizations will not prevent their members from having appropriate access to the courts. The New York Court of Appeals rejected each of plaintiff's arguments, holding that there was a valid and binding arbitration agreement between plaintiff and Alexander, and that Congress did not intend in the LMRDA to prohibit the type of arbitration which was conducted by the AFM between plaintiff and Alexander.

The New York Court of Appeals decision is res judicata as to the claims asserted in this action by plaintiff against both AFM and the proposed additional defendant, Alexander. The fact that the proceeding in the New York courts was commenced after commencement of action in this Court does not prevent giving res judicata effect to the final decision which has now been reached by the New York Court of Appeals. *Chicago, R.I. & P. Ry.* v. *Schendel*, 270 U.S. 611, 615 (1926); *Restatement of Judgments* § 43 (1942). The fact that one of the parties here—AFM—may not, strictly speaking, have been a party to the New York judicial proceeding is also no reason for holding res judicata inapplicable. Plaintiff had a full and fair opportunity to try in the state court proceedings the very claims made in this Court; and such claims were in fact tried in the state courts. Under these circumstances, even if AFM is considered to be a non-party in the state court proceedings nevertheless AFM may assert the doctrine of res judicata. *Zdanok* v. *Glidden*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); *Elder* v. *New York & Pennsylvania Motor Expres, Inc.*, 284 N.Y. 350 (1940); *Good Health Dairy Products* v. *Emery*, 275 N.Y. 14 (1937). See also *Blonder-Tongue Laboratories, Inc.* v. *The University of Illinois Foundation*, 402 U.S. 313, 328 (1971).

Res judicata applies, of course, to questions of law as well as to questions of fact, and bars a contention in the second litigation that the ruling of law in the first was erroneous. *Smith* v. *Alleghany Corp.*, 394 F.2d 381 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); 1B Moore, *Federal Practice*, p. 635.

For the above reasons, I conclude that the decision of the New York Court of Appeals in *Matter of the Arbitration Between Willard Alexander, Inc., and Don Glasser* operates as res judicata to bar plaintiff's claims in this action. Strictly speaking, it is unnecessary to go further or to give additional consideration to the merits of such claims. However, plaintiff has raised in this action, as he did in the state courts, a significant point of statutory construction with respect to Section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4). This section provides in pertinent part:

> "(4) *Protection of the right to sue.*—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: . . ."

Plaintiff claims that AFM's requirement of arbitration with respect to his dispute with Alexander is invalid under Section 101(a)(4), as a limitation on plaintiff's right to

sue. Chief Judge Fuld, speaking for the New York Court of Appeals, rejected this argument, stating:

> "It is enough to say that his reliance on section 101 (a)(4) of the Labor-Management Reporting and Disclosure Act (29 U.S. Code 411[a][4]) as a ground for setting aside the award indicates a misreading of the statute and its purpose. That provision, as the House Committee Report accompanying the Act makes clear (H.R. Rep., No. 741, 86th Cong., 1st Sess. 30 [1959]), was merely designed to protect the right of a union member to proceed in court *against the union or its officers*. Manifestly, the compulsory arbitration rules here in question in no way limit that right." (emphasis added)

Although I believe that the Court of Appeals was correct in holding that plaintiff has no valid cause of action under Section 101(a)(4), I submit that this result should be arrived at by a somewhat different path. I believe that Section 101(a)(4) is not limited to suits by a union member against the union or its officers, but is broad enough to cover disputes of the kind which existed between the plaintiff and Alexander. In my view, the statute is applicable. *But* plaintiff's claim is defeated because the statute expressly contemplates exhaustion of internal union remedies, such as arbitration, prior to resort to the courts.

The problem with the New York Court of Appeals' analysis, quoted above, is that it relies on a House Report which dealt with a bill not enacted into law. This bill was H.R. 8342, 86th Cong., 1st Sess. (1959), which provided in pertinent part:

> "*Protection of the Right to Sue.*—Except as provided herein, the right of any aggrieved member of a labor organization to institute any action in any court of the United States or any State, or a proceeding before

any administrative agency of the United States or any State, *against such labor organization or any officer thereof* shall not be limited or impaired, . . . " (emphasis added).[1]

This language, restricting the application of the statutory provision to suits "against such labor organization or any officer thereof" is in sharp contrast to the language of Section 101(a)(4) as enacted, which specifically applies to actions "irrespective of whether or not the labor organization or its officers are named as defendants or respondents."

The language of the right-to-sue provision as passed derives from a bill introduced by Senator McClellan, S. 1137, 86th Cong., 1st Sess. (1959), which was carried over as an amendment into a bill introduced by Senator Kennedy, S. 1555. Basically the same language was incorporated in the Landrum-Griffin bill introduced in the House, H.R. 8400. The House adopted the Landrum-Griffin bill.[2] After deliberation by a Conference Committee of both houses, LMRDA in its final form, was enacted, containing basically the original McCellan language in the right-to-sue provision.

Thus Congress rejected the proposal to have the right-to-sue provision limited to actions against a union or its officers, and adopted the provision which expressly negates any such limitation. Under the statute as enacted, a labor union is prohibited from placing restrictions upon the right of a union member to institute any type of litigation, subject to the qualification that the union member may be required to exhaust reasonable internal hearing procedures not to exceed four months in duration.[3]

Even in view of the above history, there is a question meriting consideration as to whether Congress actually intended to cover arbitrations of purely contractual dis-

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putes about compensation, such as the one between plaintiff and Alexander.

The main concern of Congress is committee investigations leading up to this legislation related to union corruption, mismanagement, breach of trust by union officers, and similar matters. Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 820 (1960). However, the language of the right-to-sue provision is not limited to these subjects. Also, it is reasonably clear that at least Senator McClellan, the drafter of the right-to-sue provision, had in mind that the provision would apply to the broad range of disputes and grievances, including those related to compensation, which arise in the context of labor union affairs, This appears from a statement issued by Senator McClellan in reponse to certain testimony of George Meany in the House hearings. Mr. Meany complained that a right-to-sue provision would prevent a union from providing, by way of a collective bargaining agreement or internal union rule, that an employee must present his grievances under arbitration or internal grievance procedures rather than in a lawsuit.[4] Senator McClellan issued a statement indicating that his right-to-sue provision was specifically directed to such arbitration and grievance machinery of labor unions, and was intended to prevent such machinery from consuming what he considered an excessive amount of time. For this reason his proposal provided for a time limit upon internal hearing procedures.[5]

Thus I conclude that Section 101(a)(4) is applicable to the booking commission dispute between plaintiff and Alexander, and to the AFM requirement that such dispute be arbitrated. However, in my view, that section specifically sanctions the AFM requirement of arbitration, provided that the arbitration is limited to four months' duration.

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The record is not entirely clear as to exactly how long the AFM arbitration proceeding lasted. It appears that Alexander's claim was filed on December 30, 1969. The letter of the AFM to plaintiff notifying him of this claim was sent January 26, 1970. The AFM award was made on May 15, 1970.

Assuming that the arbitration proceeding lasted from December 30, 1969 to May 15, 1970, a period of slightly more than four months, still plaintiff has no claim for violation of the four-month rule of Section 101(a)(4). He did nothing to intervene or expedite the arbitration proceeding. He took no step prior to filing his action in this Court on June 2, 1970. By that date the arbitration proceeding had been completed. Moreover, he never initiated any action in the state courts, although he had the right under C.P.L.R. § 7503 to move for a stay of the arbitration on the ground of lack of a valid arbitration agreement, and also to move under C.P.L.R. § 7511 to vacate the arbitration award upon certain specified grounds. The only action in the state courts was the one brought by Alexander to confirm the award.

The plaintiff was in no way prejudiced by the fact that the arbitration proceeding lasted slightly more than four months, and has no valid claim for any violation of the four-month rule.

Plaintiff's basic claim is that under Section 101(a)(4) he is entitled to have his booking commission dispute with Alexander litigated fully in a court of law rather than having it arbitrated, with the role of a court limited to the rather narrow scope traditionally assigned to courts following arbitration proceedings. The answer to this is that, in providing for the exhaustion of reasonable internal hearing procedures, Congress necessarily contemplated the application of the well established rules regarding limita-

tions on court review. It is settled that a court does not re-try matters decided in an arbitration. *Wilko* v. *Swann*, 346 U.S. 427, 436-37 (1953); *Saxis Steamship Co.* v. *Multifacs International Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967).

Plaintiff's motion for a preliminary injunction and for leave to file an amended complaint is denied in all respects, and the action is dismissed.

So ordered.

Dated: New York, New York, January 31, 1973.

THOMAS P. GRIESA
U.S.D.J.

FOOTNOTES

[1] The texts of H.R. 8342 and other pertinent bills leading up to the LMRDA are found in *National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959.*

[2] The Landrum-Griffin bill was one of the two principal bills introduced in the House, and, as noted above, was initially numbered H.R. 8400. 105 Cong. Rec. 14381 (1959). The other main House bill was the Elliott bill, which was introduced as H.R. 8342. 105 Cong. Rec. 14177. It was the Elliott bill which was the subject of the House report referred to in Chief Judge Fuld's opinion in *Matter of the Arbitration Between Willard Alexander, Inc., and Don Glasser.* H.R. 8342 was amended by the House so that the text of the Landrum-Griffin bill from H.R. 8400 was substituted for the text of the Elliott bill. 105 Cong. Rec. 15859. H.R. 8342 in this form was passed by the House. 105 Cong. Rec. 15882.

[3] The Supreme Court has held that the statutory provision that a union member may be required to exhaust reasonable internal hearing procedures is in effect a grant of discretion to courts to "stay their hands for four months, while the aggrieved person seeks relief within the union." *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers,* 391 U.S. 418, 426 (1968). The Supreme Court further held that under certain circumstances a union member may not be required to exhaust union procedures before resorting to a court. The circumstances dealt with by the Supreme Court were quite different from what is involved in the dispute between Glasser and Alexander.

[4] *Hearings on Proposed Labor-Management Reform Legislation Before a Joint Sub-committee of the House Committee on Education and Labor.* 86th Cong., 1st Sess., 1482-3 (1959).

[5] *Id.* at 2285.